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*Exempt from Filing Fees
 Pursuant to Gov. Code, § 6103*

9 UNITED STATES DISTRICT COURT
 10 NORTHERN DISTRICT OF CALIFORNIA
 11 (San José Division)

12 CALVARY CHAPEL SAN JOSE, et al.,

No. 20-CV-03794 BLF

13 Plaintiffs,

**DEFENDANTS COUNTY OF SANTA
 CLARA AND DANIEL HO'S RESPONSE
 TO PLAINTIFFS' ADMINISTRATIVE
 MOTION TO CONSIDER WHETHER
 CASES SHOULD BE RELATED**

14 v.

15 COUNTY OF SANTA CLARA,

16 Defendant.

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 18 Pursuant to Civil Local Rule 3-12(e), Defendants County of Santa Clara ("County") and
 19 Professor Daniel Ho ("Professor Ho")¹ respond as follows to Plaintiffs Calvary Chapel San Jose
 20 ("Calvary") and Mike McClure's (collectively, "Plaintiffs") Administrative Motion to consider
 21 whether *Calvary Chapel San Jose, et al. v. County of Santa Clara, et al.*, Northern District of
 22 California, No. 23-CV-04277-VC (the "Chhabria Action") should be related to the stayed case
 23 pending before this Court. In sum, the County and Professor Ho do not oppose relation of the two

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 26 ¹ As noted in Plaintiffs' papers, "Daniel Ho has not yet appeared" in the Chhabria Action. ECF 299
 27 at 1. Professor Ho is specially appearing for the narrow purpose of this filing and to the extent any
 28 ruling on Plaintiffs' motion might impact when he might be required to formally appear.

1 cases, so long as the Chhabria Action remains stayed to the same extent as the present case.

2 The Court first considers whether “[t]he actions concern substantially the same parties,
3 property, transaction, or event.” Civ. L.R. 3-12(a)(1). Here, both cases concern substantially the
4 same transaction or event because Plaintiffs’ claims in the Chhabria Action reproduce images
5 from—and are wholly based on a misconstruction of—Professor Ho’s expert report served in this
6 case on behalf of the County. *Compare* Chhabria Action, ECF at Ex. 3 *with id.*, ECF 27 at ¶¶ 23-38.
7 The Chhabria Action is therefore derivative of earlier litigation conduct in this case—as Plaintiffs
8 concede when they note that “as the claims in the Chhabria Action arise out of conduct undertaken
9 in this action” (ECF 299 at 1)—which is why the County moved Judge Chhabria to dismiss that
10 action under the *Noerr-Pennington* doctrine and other applicable comity principles.² *See* Chhabria
11 Action, ECF 33. In the present case, Plaintiffs allege, *inter alia*, that the County improperly
12 surveilled Calvary and its staff, visitors, and congregants as part of the County’s efforts to enforce
13 violations of its COVID-19 related public health orders. ECF 167 at ¶¶ 6, 88, 144. In the Chhabria
14 Action, Plaintiffs allege that this supposed surveillance also included geofencing, to collect and
15 “weaponize” location data for use against Plaintiffs—notably, in the same action in Santa Clara
16 County Superior Court that the County brought to enforce Plaintiffs’ COVID-19 health order
17 violations and on which this Court’s stay order under *Younger* (ECF 279) is based. *See, e.g.,*
18 Chhabria Action, ECF 27 at ¶¶ 2, 115, 116.

19 The substantial similarity in parties across both cases—Calvary, McClure, and the County—
20 also favors relation. Although SafeGraph and Professor Ho are parties only in the Chhabria Action,
21 they are alleged to be mere agents or instruments of the County. *See, e.g., id.* at ¶¶ 31 (“The
22 surveillance was initiated by the County . . . [and] SafeGraph was acting as an instrument of the
23 County . . .”) 36 (“Daniel Ho also acted as agent of the County.”). Moreover, Plaintiffs added

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26 ² Rather than rule on the County’s Federal Rule of Civil Procedure 12 arguments for dismissal (or
27 defendant SafeGraph Inc.’s Rule 12 motion), Judge Chhabria opted to stay the Chhabria Action
28 pending Plaintiffs’ Ninth Circuit appeal of this Court’s *Younger* order. Chhabria Action, ECF 57.

1 Professor Ho only after the County raised its arguments based on *Noerr-Pennington* immunity, the
 2 claim-splitting doctrine, and the first-to-file rule. *See id.* at ECF 25, 27.

3 The Court also considers whether “[i]t appears likely that there will be an unduly
 4 burdensome duplication of labor and expense or conflicting results if the cases are conducted before
 5 different Judges.” Civ. L.R. 3-12(a)(2). As to the County, duplication of labor is more than a
 6 likelihood; it is a certainty. In both the present case and the state enforcement action—for which the
 7 Court entered the parties’ discovery cross-use stipulation (ECF 84)—Plaintiffs have already taken
 8 extensive written and deposition discovery of the County’s efforts and methods to enforce then-
 9 applicable COVID-19 public health orders on both Plaintiffs and others—including depositions of
 10 the head of the County’s civil enforcement team and the individual enforcement officers who offered
 11 evidence of Plaintiffs’ violations. Plaintiffs tacitly acknowledge this fact by arguing that “it appears
 12 likely that there will be an unduly burdensome duplication of labor and expense in the Chhabria
 13 Action of that *already undertaken in this action.*” ECF 299 at 2 (emphasis added). If there were any
 14 merit to Plaintiffs’ theory of geofencing surveillance that Plaintiffs allege in the Chhabria Action,
 15 evidence of it would have surfaced through that discovery. Indeed, even after this Court entered the
 16 *Younger* stay in March 2023, discovery remained available to Plaintiffs in the state action for *almost*
 17 *a year* until the Superior Court entered judgment in February 2024.

18 As to SafeGraph and Professor Ho, no discovery has been taken of them because they are not
 19 parties in the case before this Court. The County, however, has responded recently to Plaintiffs’
 20 requests under California’s Public Records Act for any documents that might support their
 21 geofencing claims against the County, Professor Ho, and SafeGraph. Therefore, to the extent
 22 Plaintiffs’ geofencing surveillance claims can survive the pending pleadings challenges, the test for
 23 relation appears to be met—at least for Plaintiffs’ claims against the County.

24 If these two cases are related, however, the Court should order a stay of the Chhabria Action
 25 that is coterminous and coextensive with the *Younger* stay for several reasons. First, this is the
 26 outcome Judge Chhabria recently noted he would order if this Court does *not* relate the cases, except
 27 that SafeGraph, given its unique posture, may then reschedule a hearing on its motion to dismiss.
 28 *See Chhabria Action*, ECF 78. Second, Plaintiffs have confirmed, in recent meet and confer

1 discussions, that they would stipulate to a stay of the Chhabria Action, including if that case were
2 consolidated with the present case. Third, a stay of both cases would advance the interest of judicial
3 economy given the derivative nature of the allegations and claims asserted in the Chhabria Action.

4 For these reasons, the County and Professor Ho do not oppose Plaintiffs' Administrative
5 Motion, so long as the Chhabria Action remains stayed to the same extent as the present case.

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7 Dated: July 22, 2024

Respectfully submitted,

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